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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 610

J. T. JONES, *Petitioner*,

v.

METZGER DAIRIES, INC., *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioner, J. T. Jones, prays that a writ of certiorari issue to review the final judgement of the Court of Appeals for the Fifth Circuit which affirmed the summary judgment of the District Court for the Northern District of Texas, Lubbock Division, in favor of respondent and against petitioner, a person aggrieved by respondent's violations of the anti-trust laws.

Opinion Below

The opinion of the Court of Appeals is reported at 334 F. 2d 919, and is appended. The District Court did not render an opinion.

Jurisdiction

The judgment of the Court of Appeals was dated July 23, 1964, and entered on July 23, 1964. No petition for rehearing was filed. The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254(1).

Questions Presented

1. Whether in a geographic price discrimination suit by a distributor of a competing product against a manufacturer found to be engaged in commerce, it was error to limit the "relevant market" to a small area, in which the manufacturer had only one distributor-customer, and then to grant summary judgment on grounds of lack of a showing of sales to two or more customers at discriminatory prices.

2. Whether, in such a suit, where the defendant has admitted reducing its prices to its one distributor in the "relevant market", as delineated by the court, to enable the distributor to reduce its prices to a sub-distributor in order to permit the latter to meet competitive prices, and has admitted selling its products outside said "relevant market" area, and where the defendant has failed to sustain the burden of proof as to absence of factual issues, it was error to grant summary judgment.

Statute and Rule Involved

The statute involved is § 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13(a), the pertinent portion of which is as follows:

> "Sec. 2(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce,

either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . ."

Also involved is Rule 56 of the Rules of Civil Procedure, 28 U.S.C.A, the pertinent portion of which is as follows:

Rule 56. Summary Judgment.

* * * * * * *

"(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavit shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The Court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits . . ."

Statement of the Case

Issues of major importance under the federal antitrust laws are presented by this petition.

This suit was filed June 22, 1960, in the District Court of the United States for the Northern District of Texas, Lubbock Division. The plaintiff, J. T. Jones, formerly an independent milk distributor in Kermit, Winkler County, Texas, brought this action for treble damages and an injunction against four corporate defendants, including Metzger Dairies, Inc., ("Metzger") alleging price discriminations in the sale of dairy products. (R 6-12).

The period involved was June 22, 1956, to June 22, 1960, but Metzger was involved only from April, 1959, to June 22, 1960. Before April, 1959, Jones was a distributor for Borden dairy products and a sub-distributor for Metzger dairy products, but in that month he gave up his Metzger sub-distributorship, which was taken over by his former employee, Earl D. Adams (R. 198, 208, 211).

The "line of trade and commerce" involved in the action was defined by the complaint as "the sale at wholesale in West Texas of dairy products." The same paragraph went on to say, "West Texas, for the purposes of this action, is defined as all of Texas west of Forth Worth, and the area so defined includes Winkler County. . ."

The complaint alleged also that Metzger "distribute[s] such products to retailers both directly and through independent distributors," and that "During the four years next preceding the filing of this Complaint, defendants in the course of interstate commerce have exacted prices from some of their customers in Winkler County which, by reason of discounts, rebates, and terms not accorded to all purchasers on proportionately equal terms, were lower than prices exacted by them for products of like grade and quality from less favored customers in Winkler

County, other parts of Texas, and other states in which defendants operate. . .'' (R. 8-10).

The complaint went on to allege in statutory language a harmful effect on competition, and damages to the plaintiff in the sum of $250,000. Timely demand for a jury trial was made (R. 12).

Metzger's answer (R. 30-34), filed December 15, 1960, denied that it was engaged in interstate commerce; denied that it was in direct competition with plaintiff in the wholesale distribution of dairy products in Winkler County, Texas; admitted that it sold and marketed milk and other dairy products to an independent distributor who sold and distributed same in West Texas, including Winkler County; admitted that it purchased raw milk in states other than Texas for processing, packaging and distribution in Texas and that some bottles and other supplies may have been purchased outside the state of Texas for use in processing and packaging dairy products sold in Texas; denied discriminating in price in the sale of dairy products at wholesale in Winkler County, Texas; and affirmatively alleged that if it had granted any price variations or differentials within any relevant area same were cost-justified and made in good faith to meet an equally low price of a competitor.

On September 19, 1960, plaintiff filed interrogatories to all the defendants (R. 12-25), including questions pertaining to the defenses subsequently raised by Metzger's answer. Metzger objected to all but one of these interrogatories (R. 26-28).

In ruling on the objections, the court held that the plaintiff might inquire into Metzger's wholesale prices only in the 10 Texas counties of Winkler, Andrews, Midland, Upton, Ector, Crane, Reeves, Ward, Pecos and El Paso, and might inquire into its distributor prices only in "designated twelve [sic] counties counties of Texas and New

Mexico in the same general region of Winkler County." (R. 35, 38). In answering plaintiff's interrogatories as so limited, Metzger stated that its only customer in said area was its distributor, Pecos Dairy Distributing Company, Pecos, Texas, under which plaintiff was sub-distributor until April 1959 (R. 42-62). Its answers to interrogatories further showed that Metzger's plant was at Dallas, in Dallas County, and that it had sub-stations at Abilene, in Taylor County, and at Corsicana, in Navarro County, all outside the area delineated by the court. (R. 42, 43, 87-94). Also, its further answers to Interrogatory 17 (R. 90-113) show that it sold through distributors and sub-distributors (and granted rebates) in Abilene and in Sweetwater (Nolan County).

On April 15, 1961, Metzger moved for summary judgment, without supporting affidavits (R. 63, 64). On April 24, 1961, plaintiff filed his own affidavit in opposition to Metzger's motion (R. 67-70), and on May 14, 1961, he filed his amended affidavit in opposition thereto (R. 73-77). To this Metzger responded with an unsworn instrument called "Motion of Defendant Metzger Dairies, Inc. to Disregard Amended Affidavit in Opposition to Metzger's Motion for Summary Judgment" (R. 77, 78) and a letter to Judge Joseph B. Dooley (R. 79-83) quoting from portions of the deposition of Earl D. Adams. On November 8, 1961, the plaintiff designated portions of the depositions of Adams and C. M. Spruill, Kermit grocer, in opposition to the motion (R. 83).

The grounds for Metzger's motion for summary judgment were (1) that there was no genuine issue as to any material fact and (2) that Paragraph 11 of the complaint, alleging price discriminations by the defendants in the sale of dairy products to some of their customers in Winkler County as compared to their sales to less favored customers in Winkler County, other parts of Texas, and

other states, had no application to Metzger. This, Metzger stated in its motion, was affirmatively shown by unspecified portions of the depositions, answers to interrogatories, pleadings and exhibits in the cause. The two grounds for the motion actually are the same, as shown by the letter from Metzger's counsel to Judge Dooley (R. 79-83), which asserts:

"It is Metzger's contention that these depositions demonstrate that as a matter of law that Metzger did not sell its dairy products to two (2) purchasers in the geographical area contemplated in this suit. Since Metzger did not sell its products to two (2) purchasers, it follows that there could be no discrimination in pricing practices . . . Metzger has always, during the time involved in this action, either sold its milk only to Pecos Dairies Distributing Company or to Earl D. Adams and never at any time has there ever been more than one (1) purchaser from Metzger Dairies, Inc. in Winkler County, Texas."

The portions of Adams' and Spruill's depositions designated by plaintiff are summarized in plaintiff's amended affidavit. Adams testified (Supp. R. 1-6) that he, as Metzger's sub-distributor, gave Spruill, the largest grocer in Kermit, a 10% rebate, and that Metzger paid Spruill an additional 5%. Spruill paid his account monthly direct to Metzger in Dallas since Adams was unable to carry the account himself. Adams also testified that Ernest Lee, a Metzger salesman from Dallas, came out to go with him to see his Kermit accounts, including Spruill, and that Lee informed him of impending price changes and what prices he would have to charge his customers. Adams also said (Supp. R. 6-9) that when price changes occurred he had to call Dallas to get Metzger to lower its price to him. Spruill's testimony (R. 184, 190) corroborated Adams regarding the way in which Metzger handled his account.

Plaintiff's amended affidavit stated on the basis of information received by him from C. A. Sturgis, president and general manager of Pecos Dairy Distributing Company ("Pecos Dairy"), and from Adams, that Metzger dictated the prices of its products in Winkler County from about July 1959 on; gave 15% discount to Pecos Dairy which it was supposed to and did pass on to Adams; and, in January 1960, when its competitors in Winkler County raised their wholesale prices, left unchanged its distributor prices to Pecos Dairy, and through Pecos Dairy to Adams, upon the understanding that Adams would raise his wholesale prices of Metzger milk, thus giving Adams a competitive advantage over the plaintiff.

The only evidence specifically called to the court's attention by Metzger in support of its motion for summary judgment consists of approximately two pages from Adams' deposition quoted in the letter to Judge Dooley previously mentioned (R. 80-82). There, in response to leading questions by counsel for Metzger, Adams said that he was free to make any discount deal or set any price he wanted to if he could make money on it; that the arrangement for Spruill to pay Metzger direct was made because Pecos Dairy was heavily indebted to Metzger; and that as far as he knew Spruill had always bought Metzger milk through a distributor rather than direct from Metzger.

By order dated October 31, 1962, but filed November 29, 1962, the district court granted Metzger's motion for summary judgment (R. 114). This was not appealable until a final judgment was entered as to the other defendants on May 13, 1963 (R. 115).

Reasons for Granting the Writ

1. *The Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court, and has decided a federal question in a way in conflict with applicable decisions of this Court.*

The decision of the Court of Appeals applies the concept of "relevant market" for the first time to a geographic price discrimination case under the Robinson-Patman Act involving the "primary line" of competition between competing sellers. This is as much as to say that, in such a case, there must be some competitive relationship between the customers to whom differing prices were granted, which is contrary to *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 80 S. Ct. 1267 (1960), and *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, 75 S. Ct. 148 (1954). Otherwise, there could be no rationale supporting a geographical limitation such as the District Court made in confining discovery to 10 counties in West Texas and an unspecified portion of Eastern New Mexico.

The Court of Appeals attempts to justify the area limitation on the specious ground that "discovery procedures must be limited if antitrust cases are to be kept within 'reasonable bounds,'" citing *United States* v. *Watchmakers of Switzerland Information Center, Inc.*, 168 F. Supp. 904, (S.D.N.Y. 1958), a Sherman Act case.

Even if this might otherwise be so, it would not justify so limiting the area as to make it impossible for the plaintiff to establish the geographic discrimination alleged.

The opinion of the Court of Appeals leaves the impression that appellant sought to extend the discovery throughout the United States or even beyond, since he quoted the statute, which embraces "the United States or any territory thereof or the District of Columbia, or any insular posses-

sion or other place under the jurisdiction of the United States." 15 U.S.C. § 13(a). If, as Metzger maintains, it made no sales outside the state of Texas, there should be no great burden involved in answering plaintiff's interrogatories. It should be noted that, with regard to sales outside the state of Texas, the interrogatories asked for only those prices which were *higher* than those in Winkler County, Texas. (R. 21, 22).

The complaint charged that the defendants discriminated in price between customers in "Winkler County, other parts of Texas, and other states in which defendants operate . . ." (R. 10). Out of this area, the trial judge selected 10 of the 254 Texas counties and an unspecified portion of Eastern New Mexico "in the same general region as Winkler County" (R. 36). No other criteria was stated by the court. It so happened that in this limited area Metzger sold exclusively through one distributor, who in turn operated through sub-distributors. In respondent's answer brief in the Court of Appeals, p. 4, it said, "All of Metzger's other sales were direct to grocers and direct to homes," thereby admitting that it had other customers outside the 10-county area. This is also borne out by Metzger's answers to interrogatories (limited as they were), which revealed that it had its main plant, two substations, and one sub-distributor in other parts of Texas. (R. 42, 43, 87-94).

It should have been obvious that as far as Metzger was concerned the plaintiff was barred at the very threshold of his case from proving a discrimination, yet counsel was unable to bring this point home to either of the courts below. The Court of Appeals first holds the area limitation justified, then belabors the plaintiff for his inability to prove exactly what he has been foreclosed from proving! It never seems to realize that it is begging the question.

It is apparent that the Court of Appeals never under-

stood the relationship of the parties or the gravamen of the offense. Three passages in its opinion indicate that it may have considered this a *competing purchasers* case with the plaintiff complaint that Metzger sold to a competitor cheaper than it did him:

> "Here the alleged discrimination was based on sales made by Metzger to Pecos, an independent milk distributor, *which in turn resold some of these products to Jones,*" 334 F. 2d at 922 (Emphasis added.)
>
> "From the facts presented in the instant case we are unable to conclude that any acts of price discrimination occurred *between the plaintiff Jones and Metzger Dairies, Inc.* No sales of Metzger's products were made to Jones during the period in question. Metzger sold only to its distributor, Pecos." *Id.* at 924. (Emphasis added.)
>
> "We have had difficulty, as apparently did the trial court and defendant Metzger, in locating unlawful discrimination *against the plaintiff Jones . . .*" *Id.* at 925 n. 8. (Emphasis added.)

No wonder the Court of Appeals finally said, "The case remains nebulous, vague, indefinite and uncertain." *Id.* at 926. It simply never understood that the plaintiff was complaining about price concessions granted by Metzger, *after he ceased to be its subdistributor*, with the understanding that the distributor to whom these concessions were granted would pass them on through a subdistributor to retail grocers for whose business plaintiff was competing, as a distributor for *Borden* dairy products. The fact that the plaintiff once was Metzger's sub-distributor has absolutely nothing to do with the case. The confusion may have arisen from the difficulty of pleading such a compli-

cated case against the four original defendants, especially with a different time period applying to Metzger.

It is of course now well established, and the Court of Appeals had no difficulty in holding, that the purchasers need not be at the same level of the distribution system for there to be a price discrimination among them. 334 F. 2d at 924, 925, citing *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 55, 68, S.Ct. 822, 832 (1948). Thus Metzger's sales to its one distributor, Pecos Dairy, could be compared validly with its sales direct to retail grocers, making due allowance for functional discounts.

But Metzger also maintained a high degree of control over prices charged by the distributor to sub-distributor Earl Adams and by the latter to the retail grocers, thus running afoul of *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 83 S.Ct. 358 (1963), reversing *Sun Oil Co.* v. *FTC*, 294 F. 2d 465 (5th Cir. 1961). It appears that the court below still does not understand *Sun Oil's* holding that it is unlawful to cut prices to enable the purchaser to meet a competitor's price, with one exception which does not apply here. Metzger actually went one step further by cutting prices to enable the *purchaser's customer* (the sub-distributor) to meet a competitor's price!

Another important question of federal law involved in this case which has not been, but should be, settled by this Court is whether, in a geographic price discrimination case between competing sellers, where the alleged discriminator is engaged in interstate commerce, it is necessary for at least one of the sales under comparison to have been made across state lines.

This Court almost, but not quite, laid this question to rest in *Moore* v. *Mead's Fine Bread Co.*, *supra*, but the lower courts have been able to distinguish *Mead's* on various grounds. In *Willard Dairy Corp.* v. *National Dairy*

Products Corp., 309 F. 2d 943, 946 (6th Cir. 1962), *cert. denied*, 373 U.S. 932, 83 S.Ct. 1534 (1963), the Sixth Circuit said that in *Mead's*

> "... purchases involved in the alleged discriminations were in interstate commerce and interstate sales of like grade and quality were discriminated against."

In the instant case, while finding it unnecessary to rely on *Willard*, the Fifth Circuit said,

> "The instant case does not present a *Mead* situation. In *Mead*, interstate commerce was used to foster the creation of a monopoly and thereby destroy a local business. As there stated, '... the treasury used to finance the warfare is drawn from interstate, as well as local, sources which include not only the respondent but also a group of interlocked companies engaged in the same line of business ...' " 334 F.2d at 923.

Having represented the plaintiff in *Mead*, we feel that we know something of a situation there presented. It is true that during a portion of the period involved Mead sold in the border town of Farwell, Texas, bread baked 10 miles away in Clovis, New Mexico, but this accounted for only ½ of 1% of its gross sales. While saying nothing to indicate that these sales were insufficient as a basis for a Robinson-Patman Act case, this Court did point out other grounds for holding Mead to be engaged in commerce.

This case presents an opportunity for this Court to hold squarely on the issue, for the Court of Appeals has found Metzger to be engaged in commerce on the basis of its "overall activities" yet did not find "actual sales at two different prices to two different actual buyers." *Id.* at 924. While it did not in so many words say that one of

these sales must be across state lines, it did quote with approval a passage from *Willard* to this effect and also footnoted a statement from a Metzger official that during the period involved "Metzger sold no dairy products to *any other independent distributor* such as Pecos Dairy Distributing Company in other parts of Texas, nor in any other state." *Id.* at 924 n. 7. (Emphasis added.) Incidentally, the court below seems to have missed the italicized qualification in the foregoing statement.

It is possible, of course, that further discovery without area restrictions would reveal sales to customers who immediately put the products into the stream of interstate commerce. *Cf., Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 287 F. 2d 265 (7th Cir. 1961). While the issue of whether such sales would meet the "course of commerce" requirements of the Act is not clearly presented in this case, Metzger has admitted selling to Furr Food Stores (R. 92), an interstate chain operating in Texas, New Mexico, and Colorado (Furr's Inc., FTC Dkt. 8581, Trade Cas. ¶16,475.) In the present posture of this case, this possible question merely serves to emphasize what already has been said about the impropriety of the "relevant market" concept in such a case.

2. *The Court of Appeals, in approving the granting of summary judgment, has so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.*

Flying in the face of this Court's admonition in *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S. Ct. 486, 491, (1962), that "summary procedure should be used sparingly in complex antitrust litigation," the Court of Appeals approved summary judgment in this

case without putting Metzger to the burden of proof required by FED. R. CIV. P. 56.

Metzger moved for summary judgment without supporting affidavit and without any specific designation of evidence to be considered other than quotations from depositions appearing in a memorandum brief and in a letter to the trial judge (R. 79). The motion itself (R. 63) sheds no light on the grounds, and neither does the order granting it (R. 114). The order contravenes the requirement of FED. R. CIV. P. 56(d) that it specify "the facts that appear without substantial controversy."

On the other hand, appellant by affidavits (R. 68, 73) and by designations of portions of depositions (R. 83) pointed to the existence of factual issues. Since these are summarized in the Statement of the Case, they will not be repeated here. However, the brevity with which this point is presented should not be taken to indicate that appellant does not rely earnestly upon it.

Conclusion

Manifestly, the issues in the case at bar are of widespread public importance, involving as they do fundamental questions of anti-trust law. It respectfully submitted, therefore, that this petition for a writ of certiorari should be granted.

October 15, 1964.

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 20816

J. T. JONES, *Appellant*,

versus

METZGER DAIRIES, INC., *Appellee*.

Appeal from the United States District Court for the Northern District of Texas.

(July 23, 1964.)

Before TUTTLE, Chief Judge, HUTCHESON and GEWIN, Circuit Judges.

GEWIN, Circuit Judge: In this Robinson-Patman Act case (Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13), we are called upon to review certain rulings of the district court, which, inter alia, granted motion of defendant Metzger Dairies (appellee) for summary judgment, restricted the scope of written interrogatories propounded by the plaintiff Jones (appellant) to Metzger, and failed to rule upon plaintiff's motion for leave to file an amended complaint after the order granting summary judgment.

The plaintiff Jones filed this action for treble damages and an injunction against four corporate defendants (three of which have been subsequently removed by settlement) alleging price discrimination by Metzger against Jones in the sale of certain dairy products during the period April, 1959, until June 22, 1960. Jones was formerly an independent milk distributor in Winkler County, Texas, and prior to April 1959, he had been a sub-distributor for Metzger in the sense that he purchased dairy products from

Pecos Dairy Distributing Company who had purchased the same products from Metzger. He was also a distributor for Borden Dairy Products. Diagrammatically, the relative position of Jones in the distributive chain prior to April 1959, was that of a sub-distributor, whose immediate vendor was Pecos Dairy Distributing Company.[1]

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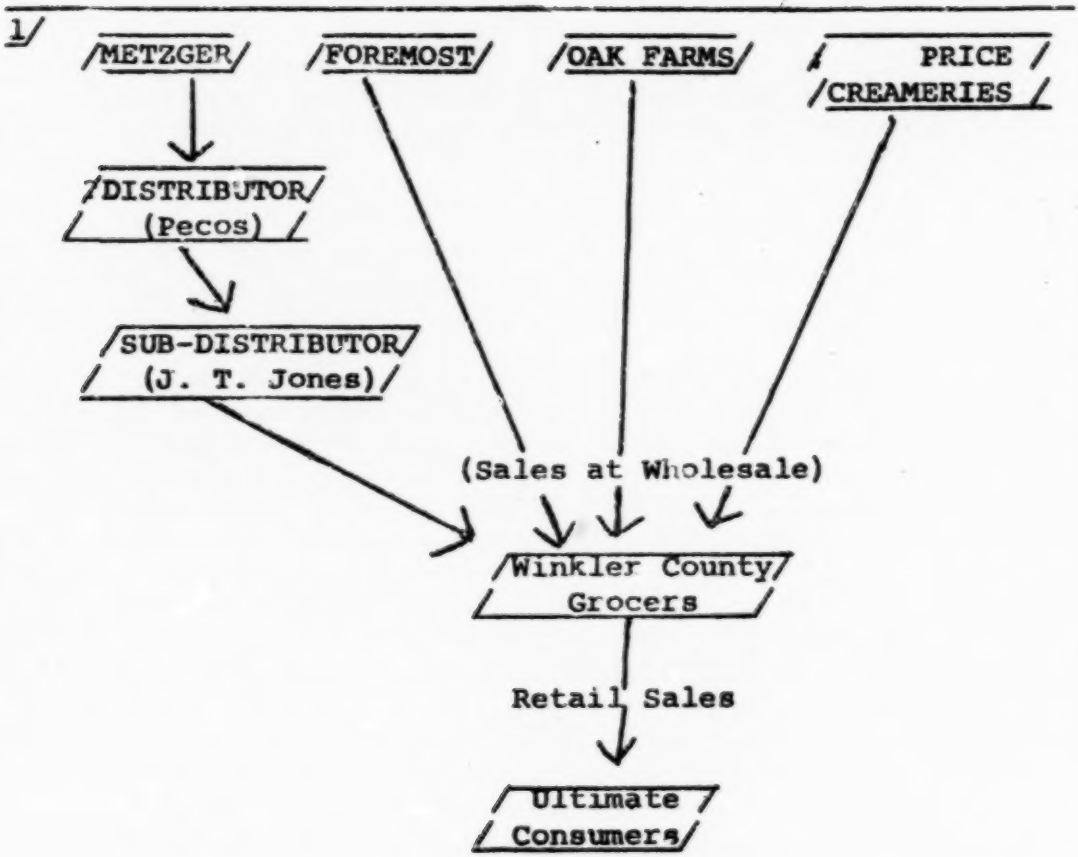
[1] The only purpose of this diagram is to show the relationship which formerly existed between Metzger and Jones. The following is from appellant's brief:

> "The period involved was June 22, 1956, to June 22, 1960, but Metzger was involved only from April, 1959, to June 22, 1960. Before April, 1959, Jones was a distributor for Borden dairy products and a sub-distributor for Metzger dairy products, but in that month he gave up his Metzger sub-distributorship, which was taken over by his former employee, Earl D. Adams (R. 198, 208, 211)."


1/
METZGER
FOREMOST
OAK FARMS
PRICE CREAMERIES
DISTRIBUTOR (Pecos)
SUB-DISTRIBUTOR (J. T. Jones)
(Sales at Wholesale)
Winkler County Grocers
Retail Sales
Ultimate Consumers

The main thrust of plaintiff's attack is directed at the district court's ruling which, in effect, geographically limited the scope of the discovery process to ten counties in West Texas and a portion of eastern New Mexico. Plaintiff assiduously contends that such a restriction is improper and that the "relevant market" in this cause can be properly expanded to include "the United States or any territory thereof or the District of Columbia, or any insular possession or other place under the jurisdiction of the United States."

We readily concede that the concept of the "relevant market" as applied to antitrust cases is certainly less than static. We are prepared to venture even further and conclude that the term "relevant market" is a rather evanescent term which can be skillfully manipulated somewhat in the manner of an accordion. In the instant proceedings, however, it is our opinion that the proper determination of the relevant market should not embrace any area beyond the restrictions provided by the order of the learned trial judge. See *United States v. Watchmakers of Switzerland Inf. Ctr.*, (U.S.D.C. S.D. N.Y. 1958) 168 F. Supp. 904, wherein the trial judge held that discovery procedures must be limited if antitrust cases are to be kept within "reasonable bounds." See also *T. C. Theater Corp.* v. *Warner Bros. Pictures, Inc., et al.*, 16 F.R.D. 173, 175 (D.C.S.D. N.Y., 1954); and *United Cigar-Whalen Stores Corp.* v. *Phillip Morris, Inc.*, 21 F.R.D. 107 (D.C.S.D. N.Y., 1957).

The general criteria of the Robinson-Patman Price Discrimination Act are these: (1) the transaction must be in interstate commerce; (2) it must have the effect of substantially lessening competition or tending to create a monopoly; (3) or it must have the effect of injuring, destroying or preventing competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of *either of them.* The acts complained of did not occur in interstate commerce, nor did they involve the factual circumstances outlined in our recent case of *Shreveport Macaroni Manufacturing*

Company v. *F.T.C.*, 321 F. 2d 404 (5 Cir. 1963).[2] Here the alleged discrimination was based on sales made by Metzger to Pecos, an independent milk distributor, which in turn resold some of these products to Jones. Metzger's plant was located in Dallas County, Texas. Pecos and Jones were located in Winkler County, Texas. The overall activities of Metzger show that it was engaged in interstate commerce.[3]

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[2] ". . . There was competition between the favored and unfavored retailers in Louisiana. Stated differently, we have a manufacturer engaged in interstate commerce making an allowance to two food chain customers who are also engaged in interstate commerce in connection with products sold only in intrastate competition, but with the allowance being made or used in interstate commerce. This, we think, meets the test of the statute that the allowance payments be made in the course of the commerce that Petitioner was engaged in at the time.

"This is clear from the language of § 2(d). It is unlawful for any person engaged in commerce [Petitioner] to pay to a customer [Weingarten and Childs] in the course of such commerce as compensation for any services furnished by the customer [Weingarten and Childs] in connection with the resale by the customer of the goods of such person [Petitioner], unless such payment is available on proportionally equal terms to all other customers competing in the distribution of such products."

• • • • •

". . . The section is applicable so long as the transaction, and we suppose this means sale, with either the favored or the competing disfavored customer crosses a state boundary. See also Austin, Price Discrimination under the Robinson-Patman Act (1953), pp. 117, 118."

[3] The appellee Metzger relies heavily on *Willard Dairy Corp.* v. *National Dairy Products Corp.*, 309 F.2d 943 (6 Cir. 1962), cert. den. 373 U.S. 932. On the other hand, Jones contends that it "is bad law and will be reversed sooner or later by the Supreme Court." While the questions in *Willard Dairy* are somewhat similar to those presented in the instant case, we have not found it necessary to rely on that decision, from which we quote:

> "The Act applies to discrimination between different purchasers of commodities of like grade and quality, and holds the seller in such a case, liable. Chicago Sugar Co. v. American Sugar Refining Co., 176 F. 2d 1, C.A. 7th; General Shale Products Corp. v. Struck Const. Co., 132 F.2d 425, 427, C.A. 6th. The Act has been construed as giving a right of action to a competitor of the seller who is injured in his business thereby as well as to a customer who has been discriminated against. Ludwig v. American Greetings Corporation, 264 F.2d 286, 289, C.A. 6th. However, by the express terms of the statute it is

It is true that the Robinson-Patman Act has been held to prohibit purely local discriminatory activities perpetrated by an interstate manufacturer when the result of these activities "may be to substantially lessen competition or to destroy local business." *Moore* v. *Meads' Fine Bread Co.*, 348 U.S. 115, 99 L.ed. 145, 75 S.Ct. 148 (1954). The instant case does not present a *Mead* situation. In *Mead*, interstate commerce was used to foster the creation of a monopoly and thereby destroy a local business. As there stated, ". . . the treasury used to finance the warfare is drawn from interstate, as well as local, sources which include not only the respondent but also a group of interlocked companies engaged in the same line of business. . ." Nor do we feel that *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, 269 F. 2d 950 (10 Cir. 1959) cert. den. 363 U.S. 843, supports the plaintiff's contentions under the facts developed. In *Atlas*, considerable emphasis was laid on the size of the accused company and its economic power. The accused company was the largest

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essential to establish a violation that the sale complained of be by a person 'engaged in commerce, in the course of such commerce.' Standard Oil Co. v. Federal Trade Comm., 340 U.S. 231, 236-237, 71 S.Ct. 240, 95 L.Ed. 239.

"In the present case there is no question but that the defendant was engaged in commerce, but it is contended that the discriminating sales complained of were not made 'in the course of such commerce' and therefore were not in violation of the Act. The authorities appear to hold that it is not enough under the Clayton Act, as amended by the Robinson-Patman Act, that the defendant be engaged in interstate commerce but it must also be shown that the sale complained of was one occurring in interstate commerce. (Citing cases) In Moore v. Mead's Fine Bread Co., 348 U.S. 115, 75 S.Ct. 148, 99 L.Ed. 145, relied upon by appellant, purchases involved in the alleged discrimination were in interstate commerce and interstate sales of like grade and quality were discriminated against. Central Ice Cream Co. v. Golden Rod Ice Cream Co., supra, 287 F.2d 265, 267, C.A. 7th.

"The cases recognize a distinction between the commerce which is covered by the Sherman Act and that covered by the Robinson-Patman Act. 'In an action brought under the Robinson-Patman Act it is necessary to allege and prove that the transactions complained of are actually in interstate commerce, while in actions brought under the Sherman Anti-Trust Act it is sufficient if the transactions complained of are shown to have affected interstate commerce.'"

manufacturer and supplier of the product involved; it enjoyed a virtual monopoly and possessed dominant market power in the area; and it was concluded that it utilized its dominant market power to foster predatory practices consisting of price discrimination, substantial reduction of competition, and the creation of a monopoly. Such activities and practices extended across state lines.[4] In carefully reviewing the facts of the instant case, we are unable to determine with any degree of certainty that discrimination[5] has ever taken place. In order for there to be discrimination between purchasers, there must be actual sales at two different prices to two different actual buyers. *A. J. Goodman & Son* v. *United Lacquer Mfg. Corp.*, (D.C. Mass.) 81 F. Supp. 890, 892. See: *Bruce's Juices* v. *Ameri-*

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[4] The following is from the testimony of plaintiff Jones:

"Q. Did you or did you not tell Earl Adams that if he talked to anyone from Metzger to tell them not to worry or anything substantially like that?

"A. The only thing I told Earl Adams that I didn't know whether I had too much of a case against Metzger's Dairies.

"Q. Is that all you told him?

"A. I told him that—I also told him that I don't think Metzger ought to be too much worried about it."

* * * * *

"Q. Well, do you attribute any of your damages arising out of your loss of the Metzger distributorship to the Metzger Dairies?

"A. No, I can't contend that Metzger Dairies were at fault as to me losing my Metzger distributorship.

"Q. Or do you attribute any to Pecos Dairy Distributors, I believe their name is, in that connection?

"A. Since he isn't a defendant in the suit, I cannot attribute any loss to him."

(According to the statements of the parties and the facts disclosed by the record, Jones was actually a sub-distributor and obtained his products from Pecos who in turn obtained the same products from Metzger.)

[5] The term "discrimination" as defined in *Webster's New Collegiate Dictionary*, 1961, means: "to make a difference in treatment or favor (of one as compared with others)." *Black's Law Dictionary* interprets "discrimination" as ". . . , a failure to treat all equally." Volume 12A, *Words and Phrases*, at page 362 defines "discrimination" within the Clayton Act, as amended, as "the act of unfairly, injuriously and prejudicially *distinguishing between persons*, . . ." (emphasis supplied)

can Can Co., 330 U.S. 743, 67 S.Ct. 1015, 91 L.ed. 1219; *Shaw's Inc.* v. *Wilson-Jones Co.*, (CCA 3) 105 F. 2d 331; *Sorrentino* v. *Glen-Gery Shale Brick Corp.*, (DC Pa.) 46 F. Supp. 709.

From the facts presented in the instant case we are unable to conclude that any acts of price discrimination occurred between the plaintiff Jones and Metzger Dairies, Inc. No sales of Metzger's products were made to Jones during the period in question. Metzger sold only to its distributor, Pecos. The courts have uniformly held that the Act contemplates two purchasers. *Hartley & Parker, Inc.* v. *Florida Beverage Corp.*, (5 Cir. 1962) 307 F. 2d 916; *Naifeh* v. *Ronson Art Metal Works, Inc.*, (10 Cir. 1954) 218 F. 2d 202, affirming 117 F. Supp. 690 (D.C. W.D. Okla., 1953); *Klein* v. *Lionel Corp.*, (U.S.D.C. Del., 1956) 138 F. Supp. 560, 563; *Shaw's Inc.* v. *Wilson-Jones Co.*, (3 Cir. 1939) 105 F. 2d 331.[6] *A. J. Goodman & Son, Inc.* v. *United Lacquer Mfg. Corp.*, (U.S.D.C. Mass. 1949) 81 F. Supp. 890, 892. As recently stated by this Court, "The evil at which the Robinson-Patman Act is aimed is discrimination between differ-

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[6] The following is from the *Shaw's, Inc.* opinion:

". . . The discrimination in price referred to must be practiced 'between different purchasers'. Therefore at least two purchases must have taken place. The term purchaser means simply one who purchases, a buyer, a vendee. It does not mean one who seeks to purchase, a person who goes into the market-place for the purpose of purchasing. In other words, it does not mean a prospective purchaser, or one who wishes to purchase, as the appellant contends.

"The appellant in its brief lays emphasis upon the fact that the appellee had sold supplies to it in the past and had promised to quote prices so that the appellant might bid upon Registration Commission contract. In short, the appellant contends that it was a customer of the appellee's and therefore a purchaser. Section 2 of the Act was designed, however, to prevent interference with the current of commerce. For the provisions of the Section to be operative, goods or commodities must be in the flow of commerce, or services must have been rendered or have been contracted to be rendered in connection with goods or commodities so placed. We may surmise that if the goods or commodities are not wholly within that flow, they at least must be touched by it, affected by it, so to speak. This we think to be the limitation imposed by Congress. Past purchases or conversations in respect to possible future purchases are insufficient."

ent competing purchasers where the effect of such discrimination may be substantially to lessen competition or tend toward a monopoly in commerce." *Hartley & Parker, Inc.* v. *Florida Beverage Corp., supra.*[7] It is not necessary that the purchasers involved must be on the same distributive level. A violation of the Act may occur when a manufacturer sells his products to a retailer at a lesser price than that charged to a wholesaler whose customers compete with the retailer. *F.T.C.* v. *Morton Salt Co.*, 334 U.S. 37, 55, 68 S.Ct. 822, 92 L.ed. 1196 (1948). We conclude that Jones has failed to establish the existence of any price discrimination, and that the district court was correct in granting the motion for summary judgment.[8]

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[7] In answer to interrogatories, Metzger's Secretary-Treasurer made the following factual statement which is uncontradicted in the record:

> "During the period from April, 1959, to June 2, 1960, Metzger sold no dairy products to any other independent distributor such as Pecos Dairy Distributing Company in other parts of Texas, nor in any other state."

[8] We have had difficulty, as apparently did the trial court and defendant Metzger, in locating unlawful discrimination against the plaintiff Jones, or the presence of other predatory or prohibited practices. See "Report of the Attorney General's National Committee to Study the Antitrust Laws" (1955):

> "Consonant with these policies, this Committee recommends that analysis of the statutory "injury" center on the vigor of competition in the market rather than hardship to individual businessmen. For the essence of competition is a contest for trade among business rivals in which some must gain while others lose, to the ultimate benefit of the consuming public. Incidental hardships on individual businessmen in the normal course of commercial events can be checked by a price discrimination statute only at the serious risk of stifling the competitive process itself. Nor should a competitive price reduction be singled out as responsible for "injury" if alternative means of access to goods at the lower price are in any event available to the buyer.
>
> "Such a view comports with the text of Section 2(a). We emphasize that it is not 'injury' to competitors but adverse effects on 'competition with' parties privy to discriminations that the statute expressly forbids. Hence we believe that criteria of competitive effect which focus exclusively on individual competitors' sales or profits exclusively

We find no error in the action of the trial court in refusing to allow the appellant to make further inquiry into the gross sales of Metzger in the State of Texas, or elsewhere in the United States. In our judgment, the facts with regard to the activities of Metzger were fully developed and known to the court and the parties. Even though not in the exact form requested by the plaintiff Jones, information as to gross sales by Metzger was fairly well presented. Full and complete discovery should be practiced and allowed, but its processes must be kept within workable bounds on a proper and logical basis for the

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on individual competitors' sales or profits rather than the health of the competitive process literally go beyond the terms of the law.

"In some circumstances, to be sure, injury to even a single competitor should bring the Act into play. Predatory price cutting designed to eliminate a smaller business rival, for example, is a practice which inevitably frustrates competition by excluding competitors from the market or deliberately impairing their competitive strength. The invalidation of such deliberate price slashes for the purpose of destroying even a single competitor, moreover, accords distinct recognition to the narrower tests of 'injury' added to the price discrimination provisions of the Clayton Act through the 1936 Robinson-Patman amendments. The discrimination provisions in the original Clayton Act were feared by the legislators as inadequate to check the victimization of individual businessmen by predatory price cuts that nevertheless created no general impairment of competitive conditions in a wider market. To reach such destructive price cuts endangering the survival of smaller rivals of a powerful seller was an express objective of the liberalizing amendments in the 'injury' clause of the Robinson-Patman Act."

The failure of the record to show by clear allegations in the pleadings, by the evidence, or otherwise, that the defendant Metzger was guilty of unlawful price discrimination, or other predatory and prohibited practices, was the subject of inquiry from the court on oral argument. The following statement from the supplemental brief of Metzger remains unanswered by Jones:

"On this point and on the case as a whole, in oral argument Appellant's counsel was again requested and challenged to state the two sales or the two customers to whom Metzger sold its products in this suit—that is, to name just two customers or any two sales, one of which is alleged to be discriminatory. Appellant will not and cannot respond to this request—much less show which sale crossed a state boundary."

determination of the relevancy of that which is sought to be discovered.

The allowance of amendments is a matter within the sound discretion of the trial court, and denial of a motion to amend will not be disturbed on appeal unless there has been a clear abuse of discretion. We are not unmindful of the fact that F.R.Civ.P. 15 enjoins liberality in granting amendments and that "leave shall be freely given when justice so requires." *Lone Star Motor Import, Inc.* v. *Citroen Cars Corp.*, (5 Cir. 1961) 288 F. 2d 69; *Watson* v. *Employers Liability Assur. Corp.*, (5 Cir. 1953) 202 F. 2d 407, rev. other grounds 75 S.Ct. 166, 348 U.S. 66, 99 L. ed. 74, rehear. den. 75 S.Ct. 289, 348 U.S. 921, 99 L. ed. 722; *Hall* v. *National Supply Co.*, (5 Cir. 1959) 270 F. 2d 379; *Volvia* v. *Bennett*, (5 Cir. 1953) 201 F. 2d 434. In our view, the allowance of the amendment would not have saved the plaintiff's case. It is apparent to us that all the issues available to the parties were fairly and carefully presented and understood by the trial court. We can detect no abuse of discretion.[9]

On oral argument, counsel for the plaintiff Jones forthrightly stated that he had been unable to find a case in point to support his contentions in the instant case. We have carefully reviewed a rather well-developed evidentiary record, the initial briefs, supplemental briefs, and reply briefs. The case remains nebulous, vague, indefinite and uncertain. Our examination of the record and briefs, however, convinces us that the case was fairly and patiently considered by the trial court and that the correct result was reached. The learned and experienced trial court retained jurisdiction of the case for approximately three years, during which period of time there were conferences, pre trial procedures, depositions, interrogatories, motions, answers, briefs, and other proceedings. The docket entries alone require almost 19 pages of the record. We have found no error.

The judgment is AFFIRMED.

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[9] Actually the court never ruled on the motion seeking an amendment; but as stated by the plaintiff Jones, the motion was not granted, and therefore the plaintiff considered it to have been denied.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
OCTOBER TERM, 1963

No. 20816

D. C. Docket No. 2660—Civil

J. T. JONES, *Appellant,*

versus

METZGER DAIRIES, INC., *Appellee.*

Appeal from the United States District Court for the Northern District of Texas

Before TUTTLE, Chief Judge, HUTCHESON and GEWIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged by this Court that the appellant, J. T. Jones, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

July 23, 1964.

Issued as Mandate: August 14, 1964.

(2898-5)

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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In the

Supreme Court of the United States

OCTOBER TERM, 1964

No. 610

J. T. JONES,

Petitioner,

v.

METZGER DAIRIES, INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Metzger Dairies, Inc., opposes the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed by J. T. Jones. The District Court for the Northern District of Texas, Lubbock Division, correctly granted Respondent's Motion for Summary Judgment, and the Court of Appeals for the Fifth Circuit properly affirmed such judgment.

STATEMENT

This is a case under the Robinson-Patman Act brought by Petitioner against four processors of dairy products — Foremost Dairies, Price's Creameries, Southland Corporation (Oak Farm dairy products) and Respondent, Metzger Dairies. (R., 6) The suit was pending in the Trial Court for over three years. There were many pre-trial conferences and hearings before the Court. The record was fully developed by discovery proceedings, including oral depositions and written interrogatories. (R., i-xix)

The Plaintiff's Original Complaint revealed at the outset that the claim against Respondent Metzger involved a much shorter period of time and different circumstances than that against the other Defendants. (R., 6-11) Metzger alone sold to an independent distributor, whereas the other defendant processors sold directly to grocery stores (see the diagram contained in the opinion of the Court of Appeals).

The deposition of the Petitioner taken early in the case exposed the Petitioner's own evaluation of his cause of action against Respondent Metzger compared to the other Defendants:

> "Q. Did you or did you not tell Earl Adams that if he talked to anyone from Metzger to tell them not to worry or anything substantially like that?
>
> "A. The only thing I told Earl Adams that I didn't know whether I had too much of a case against Metzger's Dairies.
>
> "Q. Is that all you told him?
>
> "A. I told him that — I also told him that I didn't think Metzger ought to be too much worried about it."

Respondent's Motion for Summary Judgment was granted October 31, 1962. Thereafter, Petitioner settled with all of the other Defendants and then appealed the granting of the summary judgment as to Respondent Metzger.

STATEMENT CORRECTING INACCURACIES AND OMISSIONS IN PETITIONER'S STATEMENT OF THE CASE

Petitioner, at page 6 of his Petition for Writ of Certiorari, makes the statement that Respondent's answer to Interrogatory 17 (R., 90-113) shows that Respondent sold "through distributors" and "sub-distributors" (and granted them rebates) in Abilene and Sweetwater, Texas. This statement by Petitioner would leave the definite impression that Metzger had other distributors and sub-distributors under such distributors. This is not true. The record at the pages referred to by Petitioner shows that Pecos Dairy Distributing Company was the only distributor purchasing from Respondent Metzger, during the time complained of. The sub-distributors referred to in the record are sub-distributors under Pecos Dairy Distributing Company, through which they dealt as independent sub-distributors.

Petitioner, at page 8 of his Petition for Writ of Certiorari, complains that Respondent's Motion for Summary Judgment was not supported by an affidavit as was the Petitioner's opposition to such motion. Although the Motion for Summary Judgment was not supported by an affidavit, the record discloses that it was supported by the depositions,

answers to interrogatories, pleadings and exhibits in the cause (R., 63-64). At the time the Motion for Summary Judgment was made, this case was fully developed with depositions, interrogatories and other discovery procedure having been completed. The docket entries alone in this case consume nineteen pages of the record (R., i-xix). Although Plaintiff's Amended Affidavit in Opposition of the Motion for Summary Judgment is plainly made on information and belief and replete with hearsay, Petitioner has the temerity to make the statement that Respondent called the Trial Court's attention to deposition testimony of Petitioner's former employee which Petitioner says was made in response to *leading* questions of counsel for Respondent. Even from the fragmentary reference to Plaintiff's Amended Affidavit that appears in the Petition for Writ of Certiorari, it is clear that the District Court could have properly disregarded all such matters.

REASONS THE WRIT SHOULD BE DENIED

1. The judgment of the Court of Appeals conforms with the decisions of this Court, and no important questions of federal law are presented by the petition. No important questions not previously decided by this Court are presented in this case.

The undisputed and undeniable facts in this case are these:

a. Respondent sold to *only* one independent distributor in the State of Texas (R., 42, 47).

b. Respondent sold no dairy products in interstate commerce (not even to its one distributor customer, Pecos Dairy Distributing Company). (R., 56—Answer to Plaintiff's interrogatory No. 13, which is at R., 20)

The existence of either of the above undisputed facts takes the case outside the proscription of the Robinson-Patman Act. The Courts uniformly hold that the act applies only to discrimination between different purchasers of commodities of a like grade and quality — there must be two purchasers. *A. J. Goodman & Son v. United Lacquer Mfg. Corp.*, (D.C. Mass.) 81 F. Supp. 890, 892; *Naifeh v. Ronson Art Metal Works, Inc.*, (10 Cir., 1954) 218 F. 2d 202, affirming 117 F. Supp. 690 (D.C.W.D. Okla., 1953); *Klein v. Lionel Corp.*, (U.S.D.C. Del., 1956) 138 F. Supp. 560, 563; *Shaw's, Inc. v. Wilson-Jones Co.*, (3 Cir., 1939) 105 F. 2d 331. (See: *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 67 S. Ct. 1015.) The act also applies only when the discriminating sales are made "in the course of such commerce." The cases have construed this language to mean that at least one of the two necessary sales must occur in interstate commerce. *Standard Oil Co. v. Federal Trade Comm.*, 340 U.S. 231, 236-237, 71 S. Ct. 240; *Shreveport Macaroni Mfg. Co. v. F. T. C.*, 321 F. 2d 404 (5 Cir., 1963); *Central Ice Cream v. Golden Rod Ice Cream Co.*, 287 F. 2d 265, 267 (CA 7th) cert. denied, 368 U.S. 829, 82 S. Ct. 50.

Petitioner complains that the territorial restriction imposed by the District Court has prevented a full development of the facts. He has asserted that, because of such territorial restriction, he has been prohibited from com-

paring prices outside of the geographical area charged to Respondent's "other distributors." Irrespective of any geographical limitations imposed by the District Court's ruling, the fact is that Respondent, under oath, in response to Petitioner's interrogatory stated that "*during the period from April, 1959, to June 2, 1960, Metzger sold no dairy products to any other independent distributor such as Pecos Dairy Distributing Company in any other parts of Texas nor in other states.*" (emphasis added) (R., 47)

Neither *F. T. C. v. Anheuser Busch, Inc.*, 363 U.S. 536, 80 S. Ct. 1267 (1960) nor *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 75 S. Ct. 148 (1954) has any application to this case, because each involved local price cutting by defendants who at the same time were making interstate sale of goods of like grade and quality to other purchasers at higher prices. Neither does *F. T. C. v. Sun Oil Co.*, 371 U.S. 505, 83 S. Ct. 358 (1963), control the facts of this case. In *Sun Oil* there were at least two customers, one of whom was being discriminated against.

The evaluation of the facts supporting Petitioner's claim against Metzger given by the Petitioner himself in his oral deposition is important to consider. He told his former employee, Earl Adams, that he did not know whether he had too much of a case against Respondent, Metzger. He also testified that, in his opinion, Respondent, Metzger, ought not to be too "worried" about it. (R., 215)

2. The judgment of the Court of Appeals approved the proper application of Fed. R. Civ. P. 56 in this case, because the undisputed facts viewed from the standpoint most favorable to the Petitioner exhibited that as a matter of law Respondent was entitled to summary judgment.

The use of the summary judgment procedure in this case does not violate the admonition of this court in *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473, 82 S. Ct. 486, 491 (1962). The Court in *Poller* emphasized that such indefinite elements as *motive*, *intent*, *conspiracy*, and *hostile witnesses* make summary judgment procedure no substitute for jury trials in such complex antitrust cases. Petitioner would have to admit the dissimilarity between *Poller* and this case. In this case there are no questions such as *motive*, *intent*, or *conspiracy*. In the fully developed record of this case, the affidavits, admissions, depositions and interrogatories demonstrate without question that there were not two purchases, at least one of which occurred in interstate commerce and, therefore, no discrimination under the Robinson-Patman Act.

It is not reasonably anticipated that this Court will concern itself with the complaint made by the Petitioner about the form of documents, motions and the judgment of the District Court and, therefore, Respondent will make no reply herein.

CONCLUSION

The petition for writ of certiorari presents no issues of fundamental importance and should, therefore, be denied.

Dated: November 19, 1964

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Charles P. Storey
CHARLES P. STOREY

Copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari have been delivered to counsel for Petitioner by posting same in the United States air mail, postage prepaid, properly addressed on this the 19 day of November, 1964.

Charles P. Storey
CHARLES P. STOREY